84-401

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROSEBROUGH MONUMENT COMPANY,
Petitioner,

vs.

MEMORIAL PARK CEMETERY ASSOCIATION, a corporation, VALHALLA CEMETERY, CREMATORY and MAUSOLEUM COMPANY, a corporation; LAKE CHARLES MEMORIAL PARK, INC., a corporation; ALEXANDER & SONS, INC., a corporation, d/b/a MT. LEBANON CEMETERY and MAUSOLEUM; LAKEWOOD PARK CEMETERY, INC., a corporation; SUNSET BURIAL PARK, INC., a corporation; STANZA & COMPANY, INC., a corporation, d/b/a OAKGROVE CEMETERY; LAUREL HILL MEMORIAL GARDENS, INC., a corporation; MASON SECURITIES COMPANY, d/b/a HIRMAN CEMETERY; MT. HOPE CEMETERY and MAUSOLEUM COMPANY, a corporation; SOUTHERN SECURITIES COMPANY, a corporation, d/b/a PARK LAWN CEMETERY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER A PLAINTIFF WHO PROVES EVERY CLAIM BROUGHT UNDER SECTION 1 OF THE SHERMAN ACT, 15 U.S.C. §1, RECOVERS NOMINAL DAMAGES UNDER 15 U.S.C. §15 AND OBTAINS INJUNCTIVE RELIEF UNDER 15 U.S.C. §26, IS ENTITLED TO RECOVER ALL OF ITS REASONABLE ATTORNEYS' FEES PURSUANT TO 15 U.S.C. §§15 AND 26 OR SHOULD ITS FEES BE REDUCED AND AWARDED SOLELY UNDER 15 U.S.C. §26 ONLY BECAUSE OF ITS FAILURE TO RECOVER SIGNIFICANT DAMAGES UNDER 15 U.S.C. §15.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner is a privately-owned St. Louis grave monuments and markers dealer. Respondents, listed fully in the caption, are eleven privately-owned cemeteries located in the St. Louis Metropolitan area.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CITATIONS TO OPINIONS BELOW

The Opinion of the three-judge panel of the Eighth Circuit Court of Appeals which contains that Court's decision relating to the issues here involved is not yet reported, but is printed in Appendix A hereto, *infra,* Pages A-1 through A-10. That part of the Opinion with respect to which a writ of certiorari is sought appears on Pages A-8 through A-10. The orders of the

Court denying Petitioner's and Respondents' Petitions for Rehearing and Rehearing En Banc are printed in Appendix B hereto, *infra,* Pages A-11 through A-12.

The first Memorandum of the District Court is not yet reported, but is printed in Appendix C hereto, *infra,* Pages A-13 through A-15.

The second Memorandum and Judgment of the District Court is not yet reported, but is printed in Appendix D hereto, *infra,* Pages A-16 through A-20.

The Opinion of the Eighth Circuit Court of Appeals which gave rise to the issues here involved is reported *Rosebrough Monument Company v. Memorial Park Cemetery,* 666 F.2d 1130 (8th Cir. 1981), *cert. denied* 457 U.S. 1111, 102 S.Ct. 2915, 73 L.Ed. 2d 1321 (1982). It is printed in Appendix E hereto, *infra,* Pages A-21 through A-47.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit, by a three-judge panel, rendered its original Opinion herein on May 22, 1984. After the filing of Petitioner's Petition for Rehearing or Rehearing En Banc, that Court, on June 14, 1984, (1) on its own motion, withdrew the Opinion of May 22, 1984 and substituted therefor the Opinion and Judgment dated June 14, 1984, and (2) denied Petitioner's Petition for Rehearing or Rehearing En Banc. Thereafter, Respondents herein filed their Petition for Rehearing or Rehearing En Banc. Said Petition was denied on July 12, 1984. This Petition for a Writ of Certiorari is filed within 90 days from the denial of Petitioner's and Respondents' respective Petitions for Rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved in this case are:

Section 4 of the Clayton Act, 15 U.S.C. §15. As amended September 12, 1980, Pub. L. 96-349, §4(a)(1), 94 Stat. 1156; December 29, 1982, Pub. L. 97-393, 96 Stat. 1964. Said statute is printed in Appendix F, *infra,* Pages A-48 through A-49.

Section 16 of the Clayton Act, 15 U.S.C. §26. As amended September 30, 1976, Pub. L. 94-435, Title III, §302(3), 90 Stat. 1936; Oct. 17, 1978, Pub. L. 95-473, §3(b), 92 Stat. 1466. Said statute is printed in Appendix G, *infra,* Pages A-50.

STATEMENT OF CASE

Petitioner, Rosebrough Monument Company ("Rosebrough"), is engaged in the Greater Metropolitan St. Louis Area in the sale, manufacture and installation of grave markers and monuments. The eleven Respondent cemeteries ("Cemeteries") are private, nonsectarian, for-profit, endowed care cemeteries located in the Greater Metropolitan St. Louis Area and are each competitors of Rosebrough in each of the respective cemeteries in the sale and installation of monuments and markers.

Rosebrough brought an action in the United States District Court for the Eastern District of Missouri, Eastern Division pursuant to 15 U.S.C. §1 claiming that (1) each of the Cemeteries engaged in an illegal tying arrangement by requiring that only the Cemeteries in which a marker or monument is to be placed may prepare and install the foundation for the same, and (2) all of the Cemeteries engaged in a conspiracy for the purpose of maintaining said tying arrangement.

The District Court found in favor of the Cemeteries on all claims asserted by Rosebrough. *Rosebrough Monument Company v. Memorial Park Cemetery,* 505 F.Supp. 525 (E.D. Mo. 1980).

The United States Court of Appeals for the Eighth Circuit, in *Rosebrough Monument Company v. Memorial Park Cemetery,* 666 F.2d 1130 (8th Cir. 1981), rehearing and rehearing *en banc* denied, Feb. 9, 1982, *cert. denied,* 457 U.S. 1111, 102 S.Ct. 2915, 73 L.Ed.2d 1321 (1982), reversed the findings of the District Court. The Eighth Circuit held that, as claimed by Rosebrough, (1) the exclusive foundation preparation policy of each Cemetery constituted an illegal tying arrangement (pp. 1140-46), and (2) all of the Cemeteries conspired to restrain interstate commerce for the purpose of maintaining said policy (pp. 1136-37), all in violation of Section 1 of the Sherman Act. The Eighth Circuit further held that Rosebrough established that it had been injured in its business or property under 15 U.S.C. §15 (p. 1146), but that since the District Court's finding with respect to the amount of damages was not clearly erroneous, the Eighth Circuit awarded Rosebrough nominal damages (p. 1147). In addition, the Eighth Circuit held that Rosebrough proved threatened loss and injury sufficient to require injunctive relief under 15 U.S.C. §26 (pp. 1147-48). Accordingly, the Eighth Circuit held that Rosebrough was entitled to reasonable attorneys' fees under 15 U.S.C. §§15 and 26 and remanded that matter to the District Court for award of Rosebrough's reasonable attorneys' fees (p. 1148). (In addition, the Eighth Circuit directed the District Court to formulate an appropriate injunctive decree).

On remand, Rosebrough submitted to the District Court a request for attorneys' fees in the amount of $102,587.90. Such request was based upon 1,432.05 hours expended at an average hourly rate of $71.63.

In a Memorandum dated March 18, 1983 (App. C), the District Court recognized that Rosebrough's attorneys' average hourly rate and the number of hours necessarily expended by them was not in issue and that the only serious contention of the Cemeteries with respect to attorneys' fees was "...that Plaintiff should not be compensated for claims on which it was un-

successful" (App. C, p. 13). The District Court deferred its ruling on Rosebrough's request for an award of attorneys' fees pending this Court's decision in *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

Subsequent to the rendering of said decision by this Court, the District Court awarded Rosebrough attorneys' fees in the amount of $51,293.95, exactly one-half (½) of the amount requested. The District Court justified such reduction on the sole basis that the amount awarded was "reasonable in relation to Plaintiff's success on the issue of injunctive relief, and its failure on the issue of damages" (App. D, p. A-20).

On appeal to the United States Court of Appeals for the Eighth Circuit, the Eighth Circuit affirmed the District Court's award of attorneys' fees to Rosebrough, holding in effect, that by virtue of this Court's opinion in *Hensley, supra,* Rosebrough was not entitled to an award of attorneys' fees under 15 U.S.C. §15, because it recovered only nominal damages. (App. A, p. A-9,10).

JURISDICTION OF FEDERAL COURT

The jurisdiction of the District Court was invoked pursuant to 15 U.S.C. §§15 and 26 (Sections 4 and 16 of the Clayton Act).

REASONS FOR THE ALLOWANCE OF THE WRIT

The decision of the Eighth Circuit Court of Appeals in the instant case (App. A hereto, *infra,* p. A-1 through A-10), is in conflict with and contrary to the decision of this Court in *Hensley v. Eckerhart,* 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Furthermore, the decision of the Eighth Circuit herein is in conflict with the Fifth Circuit case of *Greenhaw v. Lubbock County Beverage Association, et al.,* 721 F.2d 1019 (1983), and the Seventh Circuit case of *Mary Beth G. v. City of Chicago,* 723 F.2d 1263 (1983).

In *Rosebrough Monument Company v. Memorial Park Cemetery,* 666 F.2d 1130 (8th Cir. 1981), rehearing and rehearing *en banc* denied, February 9, 1982, *cert. denied,* 457 U.S. 1111, 102 S. Ct. 2915, 73 L.Ed.2d 1321 (1982) (hereinafter "Rosebrough I" - App. E) the Eighth Circuit Court of Appeals held that Rosebrough prevailed on *each* and *every* claim asserted by it in the District Court.

The Eighth Circuit held that Rosebrough:

(1) proved its claim of a conspiracy between the eleven Cemeteries to restrain interstate commerce unreasonably in violation of Section 1 of the Sherman Act. *Rosebrough I, supra,* at pp. 1136-37 (App. E, p. A-24);

(2) proved its eleven separate claims of an illegal tying arrangement engaged in by each of the eleven cemeteries in violation of Section 1 of the Sherman Act. *Rosebrough I, supra,* at pp. 1140-46 (App. E, p. A-31-42);

(3) established the fact of injury, entitling it to treble damages, costs and reasonable attorneys' fees under Section 4 of the Clayton Act, 15 U.S.C. §15. *Rosebrough I, supra,* at p. 1146 (App. E, p. A-43-45); and

(4) satisfied the standard for the granting of injunctive relief, costs and attorneys' fees under Section 16 of the Clayton Act, 15 U.S.C. §26 (as amended in 1976), as it demonstrated a threatened loss or damage growing out of the cemeteries' illegal conduct. *Rosebrough I, supra,* at pp. 1147-48 (App. E, p. A-46-47).

Although the Eighth Circuit did not disturb the finding of the District Court that Rosebrough failed to satisfy its burden of proof as to the *amount* of damages, *Rosebrough I, supra,* at p. 1147 (App. E, p. A-45), it did award Rosebrough nominal damages in the amount of three dollars. The Eighth Circuit remanded the matter to the District Court and directed it to promulgate an injunction and award Rosebrough attorneys' fees under 15 U.S.C. §15 *and* §26. *Rosebrough I, supra,* at p. 1148 (App. E, p. A-47).

On remand, the District Court *did not* question the reasonableness of Rosebrough's attorneys' average hourly rate or the number of hours necessarily expended by them (App. C, p. A-13). However, in determining the award of attorneys' fees, the District Court awarded Rosebrough only one-half of the amount requested for the stated reason that it only obtained an injunction and did not recover substantial damages. The District Court reasoned as follows (App. D, p. A-20):

> "There is no question that the injunctive relief sought was a substantial objective and that the relief obtained was virtually complete. By contrast, plaintiff recovered insignificant damages, through trial and appeal, after expending enormous efforts to prove its claim of well over three million dollars. Accordingly, the *Court will award as attorney's fees that amount which is reasonable in relation to plaintiff's success on the issue of injunctive relief, and its failure on the issue of damages.* The Court finds that amount to be Fifty One Thousand Two Hundred Ninety Three Dollars and Ninety Five Cents ($51,293.95)." (Emphasis added.)

Thus, the District Court, without analysis of any of the factors set forth in *Johnson v. Georgia Highway Express,* 488 F.2d 714, 717-719 (5th Cir. 1974)[1], awarded Rosebrough half of the amount requested by it, apportioning it to the injunctive relief obtained under 15 U.S.C. §26. The District Court determined

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[1] These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorneys due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amounts involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

that since Rosebrough recovered only nominal damages under 15 U.S.C. §15, it was not a prevailing party and thus was not entitled to recover any attorneys' fees thereunder because of "its failure on the issue of damages." In reaching that conclusion, the District Court relied upon the following statement of this Court in *Hensley, supra,* 76 L.Ed.2d at pp. 51-52:

> "...the District Court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation."

In affirming the District Court's award of attorneys' fees, the Eighth Circuit recognized that the foregoing standard applies when a "plaintiff succeeds *only on some* of his or her *claims* for relief" (*Rosebrough II,* App. A, p. A-9). The Eighth Circuit then held that the District Court correctly applied said standard under *Hensley* because of "appellants failure to obtain any significant money damages" (*Rosebrough II,* App. A, p. A-10).

As is shown below, the District Court, and the Eighth Circuit in affirming the District Court, misconstrued, in two respects, this Court's holding in *Hensley* and, in doing so, (1) established a dangerous and unwarranted precedent for the award of attorneys' fees to a party injured by defendant's violation of the antitrust laws and (2) applied *Hensley* in a manner contrary to this Court's expressed intentions.

In *Hensley,* this Court construed the application of a statute respecting an award of attorneys' fees in federal civil rights actions to a situation where plaintiff prevailed on some, but not all of the claims brought by it. Said statute, 42 U.S.C. §1988, provides in relevant part as follows:

> "[T]he court, *in its discretion,* may allow the *prevailing* party, other than the United States, a reasonable attorney's fee as part of the costs." (emphasis added)

This Court recognized that under Section 1988, Plaintiff must be a "prevailing party" to recover an attorney's fee and express-

ly limited the application of *Hensley* to cases in which Congress has authorized an award of fees to a "prevailing *party*," *Hensley, supra,* 76 L.Ed.2d at p. 50, n. 7. Under that section, Plaintiff may be considered a "prevailing party" for attorney's fees purposes if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit. *Hensley,* 76 L.Ed.2d at p. 50. However, the statute expressly leaves the award of fees to the District Court's discretion. In *Hensley,* this Court instructed in which cases and in what manner such discretion should be exercised.

The District Court and the Eighth Circuit applied *Hensley* to the case at bar without regard to the significant, substantive difference existing between the statute considered in *Hensley* and the statutes applicable herein — i.e. 15 U.S.C. §§15 and 26. Clearly, only 15 U.S.C. §26 speaks of an award to a "prevailing party." That section authorizes an award of a reasonable attorney's fee to a plaintiff who substantially *prevails* in obtaining *injunctive* relief. According to the District Court, in the case at bar "[T]here is no question that the injunctive relief sought was a substantial objective *and that the relief obtained was virtually complete*" (App. D, p. A-20). Thus, under *Hensley,* Rosebrough became entitled to all of its reasonable attorneys' fees on each of its claims leading to injunctive relief.

However, 15 U.S.C. §15 neither speaks of an award of attorney's fees to a "prevailing" party, nor leaves such award to the discretion of the District Court. Said section is mandatory on its face. It requires that "(a)ny person who shall be *injured* in his business or property by reason of anything forbidden in the antitrust laws...*shall* recover...a reasonable attorney's fee" (emphasis supplied). See *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 440 n.30, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978); *Administrator, EPA v. Sierra Club,* ____ U.S. ____, 103 S.Ct. 3274, 77 L.Ed.2d 938, 953 (1983) (Stevens, J., dissenting); *Baughman v. Cooper-Jarrett, Inc.,* 530 F.2d 529 (3rd Cir. 1976), *cert. denied,* 429 U.S. 825 (1976). Since the Eighth Cir-

cuit determined that Rosebrough was an *injured* party under §15, it became entitled to reasonable attorney's fees relief provided to *injured* party by said section *regardless of the amount of treble damages* awarded.

The District Court's and the Eighth Circuit's holding that an antitrust Plaintiff must recover significant treble damages in order to obtain attorneys' fees under 15 U.S.C. §15, is contrary to the long-held principle that the award of reasonable attorneys' fees is mandatory under said section. *Lafayette, supra; Administrator, EPA, supra; Baughman, supra.* It is also in direct conflict with the Fifth Circuit opinion in *Greenhaw v. Lubbock County Beverage Association, 1*21 F.2d 1019 (1983). In said case the Fifth Circuit held that *Hensley, supra,* is *not* applicable to determination of attorney's fees under 15 U.S.C. §15. It held that the plaintiffs therein were entitled to their reasonable attorney's fees once they succeeded on the issue of liability—i.e. once they were determined to be *injured* parties as a result of an antitrust violation. The Fifth Circuit further held that it was proper for the District Court to use the factors enumerated in *Johnson, supra,* in awarding attorneys' fees under said section. *Greenhaw, supra,* p. 1032.

Furthermore, the holding of the District Court and the Eighth Circuit herein contravenes the intent of Congress respecting the award of attorney's fees which was clearly demonstrated by its amendment of 15 U.S.C. §26, to allow plaintiffs in injunction cases, who have not yet suffered an injury but who are threatened with the same, to recover their attorneys' fees. In view of such amendment it strains credulity that Congress intended, on the one hand, to deny a plaintiff who has *already* suffered and proved an injury to its business its attorneys' fees, and, on the other hand, to allow a plaintiff who has *not yet* suffered such injury (and therefore cannot show any damages) to recover such fees. Under the holding of the District Court and the Eighth Circuit herein, however, a plaintiff who proves an injury to its business, but is unable to satisfy its burden of proof in respect

of the monetary amount of damage as a result of such injury, is not entitled to recover its reasonable attorneys' fees. Moreover, under the holding of the District Court and the Eighth Circuit, a Plaintiff *must* recover *significant* damages before its attorney's fees can be awarded.

If this Court does not grant this Petition, and allows the District Court's and the Eighth Circuit's holding to remain, an antitrust plaintiff who does not suffer a significant, provable amount of damage as a result of an antitrust violation will surely hesitate in bringing an action, as he may not recover any attorneys' fees, even if he proves a violation of the law and an injury to its business. Thus, a victim of an antitrust violation would have to first determine if the damages he suffered are substantial enough, and certain of proof, to insure recovery of attorney's fees. A small proprietor whose damages from a clear antitrust violation are not "significant," although they may amount to a large percentage of his profits, will not sue because he may not recover his attorney's fees. However, a large corporation which suffers "significant" damages from the same violation, which may be insignificant in comparison to its profits, will sue and recover its attorneys' fees. But the antitrust laws were not designed to benefit only large concerns.

The rulings of the District Court and the Eighth Circuit create other problems as well. When does a Court determine that damages are "significant" to warrant an award of attorney's fees? When plaintiff recovers five dollars? Ten? Fifteen? One Thousand? Does this not lead to an absurd result? A plaintiff who obtains a million dollar judgment can certainly pay his attorneys' fees and does not need an award therefor — but he will recover such fees. A plaintiff who obtains an insubstantial amount will not recover his attorneys' fees, although he is the one who really needs such award. This Court can certainly take note of the fact that it costs as much to prove an antitrust violation which caused millions of dollars in damages as it costs to prove the same violation which resulted in minimal

monetary injury. The holding of the District Court and the Eighth Circuit would give a license to an antitrust violator to do damage, as long as such damage will be less than the amount of attorneys' fees that plaintiff would have to spend in prosecuting such violation or where damages would be difficult to ascertain —i.e. it suffered by a new business (otherwise, plaintiff will have no incentive to bring an action). Similarly, such holding would give an incentive to the victim of an antitrust violation not to minimize the damages he suffers. Such victim, by minimizing the damages, would literally buy himself out of a lawsuit which would prevent future antitrust violations and benefit the community as a whole. This is clearly contrary to 15 U.S.C. §15 which only requires proof of *injury* and which, specifically, allows the plaintiff to bring an action therefor "*without respect to the amount in controversy.*"

The District Court and the Eighth Circuit erred for yet another reason.

In *Hensley,* the plaintiff failed to prevail on one of six claims it originally brought, but the District Court awarded it attorneys' fees incurred in the prosecution of all six claims. This Court held that if the unsuccessful claim was distinct in all respects from his successful claims, i.e., unrelated to the successful claim, the hours spent on the unsuccessful, unrelated claim should be excluded in considering the amount of a reasonable fee. *Hensley, supra,* 76 L.Ed.2d at p. 54-55. This Court instructed that, in cases where the hours spent with respect to the unsuccessful, unrelated claim cannot be easily identified and subtracted from the hours spent on the successful claims, the overall relief obtained becomes a significant factor to consider in making the award of attorneys' fees. This Court reasoned that, in such case, if the successful claims resulted in only minor relief, the District Court would be within its discretion to make a limited fee award. *Hensley, supra,* 76 L.Ed.2d at p. 54, n. 14.

The District Court and the Eighth Circuit applied the foregoing standard to the case at bar, without considering that (1) Rosebrough was successful on all of its claims, and (2) even if Rosebrough's prayer for damages could be considered an unsuccessful "claim," it was *related* to the other *successful* claims and, therefore, Rosebrough was entitled to all of its reasonable attorneys' fees. Since Rosebrough proved a conspiracy among the Cemeteries and an illegal tying arrangement engaged in by each of the Cemeteries, it was successful on all of its claims. As the Seventh Circuit stated in *Mary Beth G. v. City of Chicago,* 723 F.2d 1263 (1983):

> "A 'claim',...under the Federal Rules, is generally understood to comprise 'the aggregate of operative facts which give [sic] rise to a right enforceable in the court.' [citations omitted]. ...'claims' in the attorneys' fees context are often loosely defined in terms of grounds or theories of recovery or in terms of particular 'wrongs' bottomed on the same legal theory." (at p. 1279).

This Court, in *Hensley,* also equated a "claim" with a legal theory for recovery rather than with a request for a particular remedy:

> "Litigants in good faith may raise alternative legal grounds for a defined outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." (76 L.Ed.2d at p. 52).

The foregoing makes it clear that the District Court and the Eighth Circuit confused the question—whether or not Rosebrough prevailed on all of its *claims,* with the question—whether or not Rosebrough obtained the full amount of the monetary *remedy* it sought. In the case at bar, Rosebrough, having proved a conspiracy between the Cemeteries and a tying arrangement engaged in by each of said Cemeteries, prevailed on all of its claims. It is thus entitled, under *Hensley,* to reasonable attorneys' fees determined by the application of the

twelve factors identified in *Johnson, supra. Hensley, supra,* 76 L.Ed.2d at p. 51, n. 9. Furthermore, its award of reasonable attorneys' fees should not be necessarily reduced because Rosebrough failed to obtain significant damages. According to this Court:

> "Nor is it necessarily significant that a prevailing plaintiff did not receive all the *relief* requested. *For example, a plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time."* 76 L.Ed.2d at p. 52, n. 11. (Emphasis added.)

Thus, as is shown above, the District Court and the Eighth Circuit failed to follow *Hensley* and established an unwarranted precedent for future awards of attorneys' fees in cases such as the case at bar.

Finally, the District Court and the Eighth Circuit erred in their interpretation of *Hensley* even if Rosebrough's prayer for damages is deemed a "claim" within the meaning of *Hensley. Hensley* only disapproves of awarding attorneys' fees for time spent on unsuccessful claims for relief that are *unrelated* to successful claims. *Hensley, supra,* 76 L.Ed.2d at p. 51; *Mary Beth G., supra,* at p. 1279. Thus, the District Court and the Eighth Circuit should have considered whether or not Rosebrough's request for a monetary award was an unsuccessful *unrelated* "claim" or an unsuccessful *related* "claim" to its claim for injunctive relief. *Hensley* instructs that the starting point for separating an *unrelated* unsuccessful claim from a *related* unsuccessful claim is the determination whether a particular unsuccessful claim shares a "common core of facts" with the successful claim or is based on a "related legal theory." *Hensley, supra,* 76 L.Ed.2d at p. 51; *Mary Beth G., supra,* at p. 1279. As stated in *Mary Beth G., supra,* at p. 1279:

> "Under this analysis, an unsuccessful claim will be unrelated to a successful claim when the relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury on which the relief granted is premised."

Applying this analysis to the case at bar, it is indisputable that Rosebrough's "claim" for monetary recovery was intended to remedy a course of conduct identical to the course of conduct that gave rise to its "claim" for an injunction. Clearly, Rosebrough sought damages arising from the conduct which the Eighth Circuit directed the District Court to enjoin.

Moreover, as was recognized by the Eighth Circuit in *Rosebrough I, supra,* at p. 1146, in order to prove the fact of damage, Rosebrough had to prove *some* damage flowing from the illegal act of the Cemeteries. And, there can be no question that in order to have standing under the antitrust laws, Rosebrough had to prove damage to its business. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977); *McClure v. Undersea Industries, Inc.,* 671 F.2d 1287 (11th Cir. 1982).

It is therefore crystal clear that the time spent by Rosebrough's attorneys on the issue of damages had to be spent in order to show the violation of the Sherman Act itself. Without such proof, Rosebrough would not have been entitled to *any* relief. "Injury is the *sine qua non* for stating a cause of action." *Schumate & Co., Inc. v. National Association of Securities Dealers, Inc.,* 509 F.2d 147, 152 (5th Cir. 1975).

Also, with respect to the standard for the granting of injunctive relief, Rosebrough had to prove "threatened loss or damage" growing out of the violation. 15 U.S.C. §26. The Eighth Circuit determined that Rosebrough proved "beyond cavil" that the Cemeteries' acts "threatened loss or injury" to Rosebrough. *Rosebrough I, supra* pp. 1147-48. Therefore, the

time spent by Rosebrough's attorneys in preparation for the presentation of damages sustained by Rosebrough must have been expended in order to obtain any remedy. For this reason, the District Court below did not, as it could not, make a finding that it was unreasonable for Rosebrough's attorneys to either show that Rosebrough sustained damages or to seek treble damages. Thus, Rosebrough should be compensated for the time its attorneys spent on the damage issue. The failure of the District Court and the Eighth Circuit to consider the related nature of the "claims" in the case at bar is thus contrary to *Hensley,* and in conflict with the Seventh Circuit opinion in *Mary Beth G., supra.*

Finally, the District Court and the Eighth Circuit failed to consider, as mandated by *Hensley,* that Rosebrough obtained significant relief and performed substantial service to the public. *Hensley, supra,* 76 L.Ed.2d at pp. 51-52. In obtaining injunctive relief Rosebrough put a stop to antitrust violations in which the Cemeteries engaged for decades. It opened to competition a market which has been foreclosed not only to Rosebrough but also to other independent monument companies. The benefit from such competition flows not only to Rosebrough but to Rosebrough's competitors—and directly to the public.

The District Court and the Eighth Circuit focused on the fact that Rosebrough did not recover substantial treble damages. They failed to consider that the injunction obtained by Rosebrough will provide an economic benefit to numerous parties and the public, which benefit may be substantially in excess of the damages Rosebrough sought to recover. The competition which will now take place in the market in the preparation and installation of foundations will lead to lower prices for consumers and better quality of service. Such benefit to the public and to Rosebrough will continue for as long as such services are needed. Surely, the economic benefit which will result from the injunctive relief obtained by Rosebrough overshadows the

amount of damages sought by it. Accordingly, the District Court should have focused on the prospective benefit of the injunction rather than on the amount of damages awarded. It is clear that Rosebrough performed the function of a private attorney general, a function which Congress deemed important enough to reward with a reimbursement of attorney's fees.

CONCLUSION

Petitioner respectfully prays that the Supreme Court issue a Writ of Certiorari to the Eighth Circuit Court of Appeals in the herein matter to review the issues presented herein.

STOLAR, HEITZMANN, EDER,
SEIGEL & HARRIS

By CHARLES ALAN SEIGEL

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 83-1498 and 83-2351

Rosebrough Monument Company,
Appellant,

v.

Memorial Park Cemetery Association, a corporation, Valhalla Cemetery, Crematory and Mausoleum Company, a corporation; Lake Charles Memorial Park, Inc., a corporation; Alexander & Sons, Inc., a corporation, d/b/a Mt. Lebanon Cemetery and Mausoleum; Lakewood Park Cemetery, Inc., a corporation; Sunset Burial Park, Inc., a corporation; Stanza & Company Inc., a corporation, d/b/a Oakgrove Cemetery; Laurel Hill Memorial Gardens, Inc., a corporation; Mason Securities Company, d/b/a Hiram Cemetery; Mt. Hope Cemetery and Mausoleum Company, a corporation; Southern Securities Company, a corporation, d/b/a Park Lawn Cemetery,
Appellees.

Appeals from the United States District Court
for the Eastern District of Missouri

Submitted: November 18, 1983
Filed: June 14, 1984

Before HEANEY and McMILLIAN, Circuit Judges, and COLLINSON,* Senior District Judge.

McMILLIAN, Circuit Judge.

Rosebrough Monument Co. appeals from an injunction entered by the District Court[1] for the Eastern District of Missouri upon a remand from this court. The injunction enjoined appellee St. Louis area cemeteries from conditioning sale of internment space on the buyer's purchase of the cemetery's memorial foundation preparaton service and approved cemetery rules governing memorial foundation preparation by third parties. For modification of the injunction appellant argues that (1) the district court acted beyond the scope of its mandate in approving these rules and (2) certain of the approved rules are unreasonable and an abuse of discretion. In a related appeal, appellant argues that the district court erred in awarding appellant only one-half of its requested attorney's fees. For the reasons set forth below, we modify the approved rules and affirm the injunction as modified. We also affirm the attorney's fees award.

This case began as a suit by appellant seeking $3,300,000 in treble damages and injunctive relief for violation by appellees of §1 of the Sherman Act, 15 U.S.C. §§ 1-7 (1976). Appellant, a manufacturer of burial monuments and markers which also provides a monument foundation preparation service, alleged that appellees, eleven St. Louis area cemeteries and their trade association, conspired to unreasonably restrain interstate com-

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* The Honorable William R. Collinson, United States Senior District Judge for the Eastern and Western Districts of Missouri, sitting by designation.

[1] The Honorable H. Kenneth Wangelin, United States Senior District Judge for the Eastern District of Missouri.

merce through an illegal tying arrangement. Appellants challenged the cemeteries' rule that required purchasers of cemetery lots to also purchase from the cemetery the cemetery's own memorial foundation preparation service. Following a bench trial, the district court ruled in favor of the cemeteries, concluding that the challenged transaction involved the sale of a single product as a package deal and that the cemeteries' exclusive foundation preparation rule was justified by the cemeteries' ownership interests in the property and their statutory responsibility to provide perpetual care. *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n,* 505 F. Supp. 525 (E.D. Mo. 1980) (*Rosebrough I*). The district court also found that appellant was not injured by the cemeteries' rule and that appellant's evidence of damages was wholly speculative. *Id.* at 530.

On appeal this court reversed the district court on the antitrust question. *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n,* 666 F.2d 1130 (8th Cir. 1981) (*Rosebrough II*), *cert. denied,* 457 U.S. 1111 (1982). We held that appellees conspired to unreasonably restrain trade or commerce in violation of § 1 of the Sherman Act and that the tying arrangement was illegal. *Id.* at 1140-45. We rejected appellees' justification for the tying arrangement because appellees failed to meet their burden of showing that multiple entry into the market for foundation preparation "will become unmanageable and that the foundations prepared or markers installed by their private competitors will detract from the appearance [of the cemeteries] or decrease the general services rendered the public." *Id.* at 1146. Recognizing that appellees had a legitimate property interest, we nevertheless concluded that this interest could be protected by less restrictive alternatives such as quality specification guidelines for foundation preparation by third parties. *Id.* at 1145.

In considering what remedy was appropriate, we concluded that the district court's finding that appellant failed to prove the

fact of damage was clearly erroneous, but that the finding that appellant failed to satisfy its burden of proof as to the amount of damages was not. We therefore affirmed the denial of damages but directed the district court to award appellant nominal damages in the amount of $1.00 trebled to $3.00. We reversed the district court's denial of injunctive relief and remanded this portion of the cause to the district court for "formulation of an appropriate order," adding that "[a]ppellees, individually or through [their trade association], are free to propose and adopt reasonable rules and guidelines with respect to foundation preparation and installation of monuments by third parties." *Id.* at 1148. Finally, we held that appellant was entitled to reasonable attorney's fees and costs under 15 U.S.C. §§ 15 & 26 (1976 & Supp. IV 1980) and remanded this matter as well to the district court for determination. *Id.*

On remand, the injunction issue was submitted on each party's proposed form of injunction and on the prior record. The district court entered an order enjoining appellees' tying arrangement and requiring appellees to allow independent monument dealers to perform memorial foundation preparation and installation services

> in accordance with rules and regulations which may be adopted by the cemeteries and which may contain any or all of the following provisions:
>
> (1) the cemetery may establish specifications for the foundation of each type memorial which it permits in the cemetery. These specifications shall be the same as the cemetery itself utilizes in preparing foundations for particular type memorials;
>
> (2) the cemetery may schedule, upon reasonable notice, all installations, taking into account weather and ground conditions, cemetery burial services, availability of personnel, etc.;
>
> (3) the cemetery may require that the foundation site be laid out by cemetery personnel;

(4) the cemetery may supervise the foundation and installation process and require the installation meet specifications after inspection and prior to placement of a memorial;

(5) the cemetery may require removal of excavated dirt and cleanup of the installation site;

(6) the cemetery may require

(a) evidence that the installer's employees are covered by workman's compensation insurance and that the installer carries adequate public liability insurance in which the cemetery is a named insured, and

(b) a bond to insure compliance with the rules and regulations;

(7) the cemetery may charge a fee based on its actual labor costs in connection with the third party memorial foundation services;[2]

(8) if the cemetery contributes separately to a fund for the care of memorials, it may require the third party installer to contribute to such fund the same percentage of the charge by said installer as is contributed by the cemetery from its own installation charge;[3]

(9) the cemetery may require that the installer expeditiously correct any deviations from the specifications. If, after notice, any deviation is not corrected the cemetery may make such corrections at the installer's expense. All such rules and regulations which the cemetery may hereinafter adopt are to be reasonable in nature and application.

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[2] As amended by the district court's order dated May 17, 1983.

[3] As amended by the district court's order dated May 17, 1983.

Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n, No. 77-883 C (1), slip op. at 2-3 (E.D. Mo. Mar. 18, 1983) (order) (*Rosebrough III*). The district court explained that the approved rules, which were based on appellees' proposed injunction order, were designed to preserve accountability and responsibility in the memorial foundation preparation market and to avoid new and fresh disputes over each foundation preparation. *Id.* at 2 (memorandum).

On the attorney's fees issue, the district court determined that under *Hensley v. Eckerhart,* 103 S.Ct. 1933 (1983), it was required to take into account the significance of appellant's overall relief in fixing reasonable attorney's fees. The district court noted that appellant had won insignificant damages "after expending enormous efforts to prove its claim of well over three million dollars," and awarded appellant $51,293.95, or one-half the requested amount of attorney's fees. *Rosebrough III,* No. 77-883 C (D) (Sept. 6, 1983). Appellant now appeals from the injunction and the attorney's fee award.

I. The Injunction

Appellant lodges two attacks against the injunction. First, appellant argues the mandate from this court (*i.e., Rosebrough II*) did not authorize the district court to approve any cemetery rules and guidelines within the ambit of the injunction, but specifically relegated the proposal and adoption of rules to the cemeteries. Second, appellant argues even if the district court had the authority to approve rules, certain of the rules actually approved represent an abuse of discretion. Specifically, appellant challenges rules (3), (4), (6)(b), (7) and (8) as violative of this court's holding in *Rosebrough II.*

In *Rosebrough II* we recognized the need to reconcile the goal of open competition in the foundation preparation market with the cemeteries' property interests and statutory obligations. On remand it was clearly within the district court's authority as a court of equity to fashion a remedial decree which would go

beyond a mere proscription against the invalid tying arrangement and which would fit the exigencies of this particular case. Furthermore, "it is desirable, in the interests of the court and of both litigants, that the decree [in an antitrust case] be as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know their duties and unintended contempts may not occur." *International Salt Co. v. United States,* 332 U.S. 392, 400 (1947).

Nevertheless, it was incumbent upon the district court to fashion an order which would, in accordance with *Rosebrough II,* effectively open to competition the market that had been closed by the cemeteries' illegal restraints. We do not believe that the district court's order accomplishes this. By requiring that foundation sites be laid out by cemetery personnel and that the work of third party installers be supervised at a fee, both of which are permitted by the injunction, the cemeteries could gain an unfair competitive advantage over the third party installers and thus maintain the market control which was achieved through the illegal tying arrangements. As we noted in *Rosebrough II,* 666 F.2d at 1139 n.5 and 1146, there is no evidence in the record to indicate that third party installers cannot lay out the foundation sites and perform their work without cemetery supervision. We therefore hold that rules (3) and (4) be deleted from the injunction.

We believe that rule (6)(b) which allows a cemetery to require a bond from third party installers to insure compliance with the cemetery's specifications is reasonable. Such a requirement would not appreciably add to the third party installer's costs and would therefore have little anticompetitive effect. Furthermore, this requirement would not only serve to protect the cemeteries in the event of non-compliance but would also protect consumers who purchase foundation preparation services from third party installers.

We modify rule (7) to read as follows: "the cemetery may charge a fee based on its actual labor costs to inspect the finish-

ed work product of third-party memorial foundation services." This would be a fair accomodation to the cemetery's legitimate concern and need for quality control. Because the cemetery itself would incur labor costs in connection with the inspection of foundations prepared and installed by its own employees, the anti-competitive effect of charging third party installers similar costs should be minimal.

Finally, we hold that rule (8) be deleted from the injunction. In Missouri, an "endowed care cemetery" is required to set aside and deposit in a trust fund a minimum of ten percent of the gross sales price, or five dollars, whichever is greater, for each grave space sold. The income from said fund is to be used only for care and maintenance of the cemetery. Mo. Rev. Stat. §§ 214.320-.330 (1976). A cemetery is not statutorily required to set aside any amount from the price of its installation service. Whether a cemetery chooses to do so should not obligate a third party installer to contribute to a fund to cover the costs of what remains the cemetery's responsibility, *i.e.*, care and maintenance of the cemetery. We believe that the rules permitting the cemetery to require a bond to ensure compliance with the cemetery's installation specifications, to inspect, at a fee, the finished work product of third party installers, and to require correction of any deviations adequately protect a cemetery against incurring care and maintenance costs resulting from third party installations.

The injunction as modified is in keeping with our holding in *Rosebrough II* and strikes the proper balance between the competing interests involved in this case.

II. Attorney's Fees

Appellant argues that the district court erred in reducing its attorney's fees award to one-half of the amount requested because appellant failed to obtain monetary relief except for $3.00 in nominal damages.

The statutory bases for an award of attorney's fees in this case are 15 U.S.C. §§ 15 and 26 (1976 & Supp. IV 1980), which entitle an antitrust plaintiff to recover reasonable attorney's fees as a concomitant to a damage award or injunctive relief.[4]

In *Hensley v. Eckerhart,* 103 S. Ct. at 1939-41, the Supreme Court set forth standards to be applied by the district courts in determining what fee is "reasonable." These standards are applicable for all cases in which Congress has authorized an award of fees to a prevailing party. *Id.* at 1939 n.7. When a plaintiff succeeds only on some of his or her claims for relief, the district court is directed to focus on the work expended on the successful claims and on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation. *Id.* at 1940. The Court explains that there is no precise rule or formula for making these determinations. "The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." *Id.* at 1941.

The district court has considerable discretion in determining the amount of a fee award. The standard applied by this court in reviewing an attorney's fees award is whether the district court's findings were clearly erroneous as to the factual basis for

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[4] 15 U.S.C. §§ 15 (Supp. IV 1980) provides: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor...and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

15 U.S.C. § 26 (1976) provides:

> Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws .... In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

the award, or whether it committed abuse as to the discretionary margin involved in its allowance. *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1274 (8th Cir.), *cert. denied*, 449 U.S. 1063 (1980). In the present case the district court, which presided over the litigation, was in the best position to evaluate the time and resources expended on appellant's unsuccessful attempt to prove its measure of damages. We find no error or abuse of discretion in the district court's reduction of the attorney's fee award by one-half to account for appellant's failure to obtain any significant money damages.

Accordingly, we modify the injunction as set forth in this opinion, and we affirm the award of attorney's fees in the amount of $51,293.95.

A true copy.

ATTEST:
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1983

No. 83-1498-EM & 83-2351-EM

Rosebrough Monument Co.
Appellant,

vs.

Memorial Park Cemetery Association, etc., et al
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

CORRECTED ORDER
(Filed June 14, 1984)

The petition of appellant Rosebrough Monument Company for rehearing or rehearing en banc and to modify the Court's judgment is denied. On the Court's own motion, the opinion issued May 22, 1984 is withdrawn, the judgment entered that same date set aside, and the opinion and judgment dated June 14, 1984 are substituted therefor.

The parties shall have the period set forth in Federal Rules of Appellate Procedure 39 and 40 for filing motions for cost and petitions for rehearing.

A true copy:
ATTEST: Robert D. St. Vrain
Clerk, U. S. Court of Appeals, 8th Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1983

83-1498-EM.

Rosebrough Monument Company,
Appellant,

vs.

Memorial Park Cemetery Association, a corporation, et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Petition of appellees for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

July 12, 1984

ORDER ENTERED AT THE DIRECTION OF THE COURT:

/s/ Robert D. St. Vrain

Clerk, U. S. Court of Appeals, 8th Circuit.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 77-883 C (1)

Rosebrough Monument Company,
Plaintiff,

vs.

Memorial Park Cemetery Association, et al.,
Defendants.

MEMORANDUM
(Filed March 18, 1983)

This matter is before the Court for an award of attorneys' fees pursuant to 15 U.S.C. §15.

The parties have submitted various memoranda and affidavits in support of their respective positions. Plaintiff's attorneys claim they are entitled to One Hundred Two Thousand Five Hundred Eighty Seven Dollars and Ninety Cents ($102,587.90) which represents 1432.05 hours at an average hourly rate of Seventy One Dollars and Sixty Three Cents ($71.63). While defendants attack plaintiff's recordkeeping, plaintiff's average hourly rate and the number of hours necessarily expended, their principal focus centers upon the contention that plaintiff should not be compensated for claims on which it was unsuccessful. Specifically, defendants maintain that the nominal actual damages awarded plaintiff mandates a proportionate reduction of hours attributed to the research and development of the actual damage issue.

Defendants' position with regard to apportioning attorneys' fees is not without support. *Phillips v. Crown Central*

Petroleum Corp., 602 F.2d 616 (4th Cir. 1979), *cert. denied* 444 U.S. 1074 (1980); *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978); *Beech Cinema v. 20th Century Fox Film Corp.*, 480 F.Supp. 1195, 1197 (S.D. N.Y. 1979); *Locklin v. Day-Glow Color Corp.*, 378 F.Supp. 423, 428 (N.D. Ill. 1974); *Vandervelde v. Put and Call Brokers & Dealers Association*, 344 F.Supp. 157, 160 (S.D. N.Y. 1972). There is a contrary line of cases, which at this time, appears to be the majority view. *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291, 1313 (9th Cir. 1982); *Virginia Academy of Clinical Psychologists v. Blue Shield*, 543 F.Supp. 126, 140-42 (E.D. Va. 1982); *Blackgold Ltd. v. Rockwool Industries, Inc.*, 529 F.Supp. 272, 278 (D. Colo.), *appeal dismissed* 666 F.2d 1308 (9th Cir. 1981); *see generally Jones v. Diamond*, 636 F.2d 1364, 1381-82 (5th Cir.) (en banc), *cert. dismissed* 453 U.S. 950 (1981); *Gurule v. Wilson*, 635 F.2d 782, 793 (10th Cir. 1980) (apportionment of attorney's fees under 42 U.S.C. § 1988 for unsuccessful claimants is not permitted).

The Eighth Circuit has not squarely addressed the issue of apportioning attorneys' fees based upon the parties success on various claims in antitrust cases under 15 U.S.C. § 15. This Circuit has indicated some disapproval of apportioning attorneys' fees in civil rights cases. *See Brown v. Bathke*, 588 F.2d 634, 637, n.5 (8th Cir. 1978). Moreover, a recent district court decision by Judge Elmo Hunter, which was affirmed by the Eighth Circuit, held that apportioning attorneys' fees "on a mathematical approach comparing the total number of issues in the case with those actually prevailed upon" is impermissible under 42 U.S.C. § 1988. *Eckerhart v. Hensley*, No. 75-CV-87-C, slip op. at 7 (W.D. Mo. Jan. 23, 1981), *aff'd* No. 81-1227 (8th Cir. Sep. 28, 1981), *cert. granted* 102 S.Ct. 1610 (March 1, 1982).

Since essentially the same considerations that control the award of attorneys' fees in civil rights cases apply in the award of attorneys' fees in antitrust litigation, the Court is reluctant to consider an apportionment theory. *See* S. Rep. No. 94-1011, 94

Cong. 2nd Session 6, Reprinted in (1976), U.S. Code and Cong. & Ad. News, pp. 5908, 5913. However, the Eighth Circuit's unpublished decision in *Eckerhart* is before the Supreme Court and that Court may conclusively decide whether a district court's award of attorneys' fees should be tied slowly to those issues prevailed upon. The Court will therefore defer a decision on attorneys' fees until the Supreme Court has rendered an opinion in *Eckerhart*. The parties may submit five page briefs within ten (10) days of the Supreme Court's decision on this issue.

The Court is mindful of plaintiff's desire to receive its attorneys' fees. The delay caused will be considered when an award is ultimately ordered.

It Is So Ordered.

Dated this 18th day of March, 1983.

/s/ H. Kenneth Wangelin
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 77-883 C (D)

Rosebrough Monument Company,
Plaintiff,

vs.

Memorial Park Cemetery Association, et al.,
Defendants.

JUDGMENT

(Filed September 6, 1983)

In accordance with the Memorandum of this Court filed this date and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff Rosebrough Monument Company shall be awarded costs against all defendants jointly and severally in the amount of Four Thousand Eight Hundred Eighty Three Dollars and Ninety One Cents ($4,883.91); and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Rosebrough Monument Company shall be awarded attorney's fees against all defendants jointly and severally in the amount of Fifty One Thousand Two Hundred Ninety Three Dollars and Ninety Five Cents ($51,293.95).

Dated this 6th day of September, 1983.

/s/ H. Kenneth Wangelin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 77-883 C (D)

Rosebrough Monument Company,
Plaintiff,

vs.

Memorial Park Cemetery Association, et al.,
Defendants.

MEMORANDUM

This matter is before the Court upon plaintiff's amended bill of costs and defendants' objections thereto. Also before the Court is plaintiff's request for attorney's fees pursuant to 15 U.S.C. § 15 (1976).

I. Bill of Costs

Defendant first objects to the inclusion in plaintiff's bill of costs of fees paid to Harlan Brown and Mr. Atwood, since they did not testify at the trial; and to Carroll Shelton, plaintiff's expert witness, since the Court did not permit damages to be proven. For reasons set forth by this Court in its Memorandum dated February 27, 1981, the Court will not permit fees for those witnesses who did not appear in court or attend the trial. However, the mere fact that the Court did not permit proof of damages is not a proper ground to deny fees to those witnesses actually called pursuant to plaintiff's good faith prosecution of the case. Hence, fees for Mr. Shelton will be permitted.

Defendants next object to Eight Hundred Eighty Nine Dollars and Eighty Eight Cents ($889.88) claimed by plaintiff for exemplification and copies of papers. In view of the length, scope and complexity of this case, the Court cannot say that this sum is not within reason and hence will permit the full amount.

Defendants also object to plaintiff's costs for copies of depositions taken by the defendants. Generally, the costs of obtaining copies of depositions is not taxable as a cost since the depositions are on file and available to all parties. *Esler v. Safeway Stores, Inc.*, 77 F.R.D. 479, 482-83 (W.D.Mo. 1978). In this case, plaintiff has made no showing that the copies were obtained for any purpose other than for convenience of the parties. Hence, the Court will not permit plaintiff to recover the costs of those copies.

The defendants' next objection centers on costs related to plaintiff's appeal. Plaintiff, however, has deleted the items in question from the amended bill of costs.

Defendants' final objection pertains to a sum of One Hundres Sixty One Dollars and Ninety Seven Cents ($161.97) for unidentified exhibits and One Hundred Seventy Dollars ($170.00) for photos. For reasons set forth in its Memorandum of February 27, 1981, the Court will permit these items to be taxed as costs.

In view of the above considerations, the Court will permit costs to be assessed in accordance with plaintiff's amended bill of costs (a total of Five Thousand Three Hundred Fifty Three Dollars and Forty Six Cents ($5,353.46), reduced by Seventy Dollars ($70.00) for witness fees for Harlan Brown and Mr. Atwood, and further reduced by Three Hundred Ninety Nine Dollars and Fifty Five ($399.55) for depositions taken by the defendants. Thus, the total award shall be Four Thousand Eight Hundred Eighty Three Dollars and Ninety One Cents ($4,883.91).

II. Attorney's Fees

The issue of attorney's fees was previously briefed by all parties. In a Memorandum dated March 18, 1983, this Court deferred its ruling pending the Supreme Court's decision in *Eckerhart v. Hensley*, No. 75-CV-87-C (W.D.Mo. January 23, 1981), *aff'd* 664 F.2d 294 (8th Cir. 1981), *cert. granted* 455 U.S.

988 (1982). That decision was subsequently rendered, *Hensley v. Eckerhart,* 51 U.S.L.W. 4552 (U.S. May 16, 1983).

The Court recognizes at the outset that *Eckerhart* was a civil rights case, unlike the present antitrust case. However, the Court did not limit its holding or its discussion to civil rights litigation, and in view of the common characteristics of large, complex cases presenting numerous issues and susceptible to partial success, the Court finds *Eckerhart* applicable to the present case.

The portion of the *Eckerhart* holding applicable to the present case is that, in awarding attorney's fees to a prevailing party who has achieved only partial success:

> . . .the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

51 U.S.L.W. at 4555. The Court emphasized repeatedly that the degree of success obtained is the critical factor.

Plaintiff argues that a full assessment of attorney's fees is appropriate because it prevailed on all counts, notwithstanding that only One Dollar ($1.00) was awarded and then trebled for a total recovery of Three Dollars ($3.00). Plaintiff maintains that the injunctive relief awarded, combined with the nominal damages, constituted substantial success and justifies a full award of fees.

The Court does not find plaintiff's view to be consistent with its reading of *Eckerhart*. The mere fact that plaintiff obtained judgment on one or more counts does not necessarily establish the "degree of success" but rather goes to determining whether plaintiff was a prevailing party, and hence entitled to fees at all. As the Court noted:

> That the plaintiff is a "prevailing party" therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved.

Id. Thus, in evaluating the appropriate *amount* of fees, the Court looks more broadly to the "significance of the overall relief." This evaluation must necessarily include a consideration of the amount of damages recovered compared to the amount sought, as well as all other relief (including injunctive relief) that collectively measures the fruits of plaintiff's efforts.

There is no question that the injunctive relief sought was a substantial objective and that the relief obtained was virtually complete. By contrast, plaintiff recovered insignificant damages, through trial and appeal, after expending enormous efforts to prove its claim of well over three million dollars. Accordingly, the Court will award as attorney's fees that amount which is reasonable in relation to plaintiff's success on the issue of injunctive relief, and its failure on the issue of damages. The Court finds that amount to be Fifty One Thousand Two Hundred Ninety Three Dollars and Ninety Five Cents ($51,293.95).

Defendant Memorial Park Cemetery Association argues that any award of attorney's fees should be apportioned equally among the eleven (11) defendants. Inasmuch as the final injunctive relief was directed toward the defendants collectively, and no apportionment of liability was made as a result of the litigation, there appears to be no basis for apportioning the fees among the defendants on a percentage basis. Accordingly, attorney's fees will be taxed to all named defendants jointly and severally.

Dated this 6th day of September, 1983.

/s/ H. Kenneth Wangelin
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1963

Rosebrough Monument Company,

Appellant,

vs.

Memorial Park Cemetery Association, a corporation; Valhalla Cemetery, Crematory and Mausoleum Company, a corporation; Lake Charles Memorial Park, Inc., a corporation; Alexander & Sons, Inc., a corporation, d/b/a Mount Lebanon Cemetery and Mausoleum; Lakewood Park Cemetery, Inc., a corporation; Sunset Burial Park, Inc., a corporation; Stanza & Company, Inc., a corporation, d/b/a Oak Grove Cemetery; Laurel Hill Memorial Gardens, Inc., a corporation; Mason Securities Company, d/b/a Hiram Cemetery; Mount Hope Cemetery and Mausoleum Company, a corporation; Southern Securities Company, a corporation, d/b/a Park Lawn Cemetery,

Appellees.

Submitted: June 16, 1981
Filed: Dec. 9, 1981

Before McMILLIAN and ARNOLD, Circuit Judges, and HANSON,* Senior District Judge.

McMILLIAN, Circuit Judge.

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* The Honorable William C. Hanson, United States Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

Appellant Rosebrough Monument Co. appeals from a final judgment entered in the District Court for the Eastern District of Missouri denying its claims for treble damages and injunctive relief for antitrust violations. For reversal appellant contends that the district court erred in (1) finding that the cemeteries did not conspire to monopolize the sale, manufacture, installation and maintenance of grave monuments and markers in the St. Louis Metropolitan area; (2) finding that the exclusive foundation preparation policy did not constitute an illegal tying arrangement; and (3) finding that appellant suffered no damages as reflected in a general decline in business and profits. We reverse in part and remand for further proceedings.

Appellant is a privately held Missouri corporation that manufactures and sells burial markers and monuments and performs certain installation services in connection therewith.[1] Each appellee is a Missouri corporation that owns and operates a cemetery in the St. Louis metropolitan area.

For at least twenty years, virtually all of the nearly fifty cemeteries located in the St. Louis metropolitan area have had an agreement which requires the preparation of the foundation for grave monuments or markers be done exclusively by the cemetery that owns the lot. Under the terms of the exclusive foundation preparation policy, independent memorial dealers such as appellant can sell grave markers or monuments to the general public, but only the cemeteries can prepare the foundations for them. Some of the cemeteries allow appellant to place or position its memorials or markers on cemetery-prepared foundations. The cemeteries charge appellant for foundation preparation and appellant must then pass the charge on to the consumer. The cemeteries, however, do not require that a monument or marker be placed on every grave site.

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[1] A monument is a stone memorial or tombstone consisting of two parts, the base and the die which is set upright upon the base. A marker, on the other hand, is a smaller flat memorial that is frequently made of bronze, copper or some other metal.

Each cemetery sells markers (and some sell monuments) for installation on its own grounds. Thus, the cemeteries are in competition with appellant and all other monument dealers in the St. Louis metropolitan area for the sale of grave markers and monuments.

Appellant seeks injunctive relief alleging that the exclusive foundation preparation policy constitutes an illegal tying arrangement which restrains competition and ultimately results in a higher price to consumers.

For a tying arrangement to exist, at least two distinct products or services must be sold or leased. The cemeteries generally deny any illegal tying arrangement, arguing that only one product is being sold. All cemeteries operating in Missouri have a perpetual statutory obligation to maintain the appearance of their property. Ten percent of the purchase price of each grave site is paid into a separately managed irrevocable trust fund for the care and upkeep of each cemetery. (Mo.Rev.Stat. §§ 214.270-410 (1978)). As an affirmative defense, appellees justify their exclusive foundation preparation policy on the ground that, as endowed care cemeteries, they are responsible in perpetuity for all grave memorials and frequently have to reset many that have settled or shifted. Thus, according to appellees, the benefit derived by the public because of the exclusive foundation preparation policy outweighs any alleged anticompetitive effect.

Following a bench trial, the district court found in favor of the cemeteries. *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n,* 505 F.Supp. 525 (E.D.Mo. 1980). According to the district court, the transaction involved the sale of just one product as a package deal (cemetery lot, interment, foundation preparation, and installation). The district court held that the exclusive foundation preparation policy was justified by the cemeteries' responsibility to provide perpetual care. The district court failed to find a conspiracy because there was no "conscious parallelism" in price setting for the foundation prepara-

tion work. Finally, the district court held that the alleged damages were wholly speculative. This appeal followed.

I. CONSPIRACY

In its complaint appellant alleges that appellees, individually and through their trade association (Cemetery Management Association of Greater St. Louis), conspired to restrain interstate commerce unreasonably in violation of § 1 of the Sherman Act.[2] 15 U.S.C. § 1. We agree.

In 1959, the cemetery owners in the St. Louis metropolitan area formed the Cemetery Management Association, a trade association[3] which includes among its membership all appellees except Memorial Park Cemetery. Appellant argues that the trade association was the mechanism by which appellees forestalled competition when it adopted the exclusive foundation preparation policy.

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[2] 15 U.S.C. § 1 provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

[3] A trade association is an organization of producers or distributors of a commodity or service upon a mutual basis for the purpose of promoting the business of their branch of industry and improving their service to the public through the compilation and distribution of information, the establishment of trade standards and the cooperative handling of problems common to the production or distribution of the commodity or service with which they are concerned.

S. Kirsh, Trade Associations, The Legal Aspects 13 (1928) (citation omitted).

In analyzing whether a trade association agreement restrains competition in the profession, federal courts have most frequently applied the "rule of reason."[4] *National Society of Professional Engineers v. United States,* 435 U.S. 679, 687-92, 98 S.Ct. 1355, 1363-65, 55 L.Ed.2d 637 (1978) (*Professional Engineers*); *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 50, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568 (1977) (*Continental T.V.*); *Board of Trade v. United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 243, 62 L.Ed. 683 (1918); *Standard Oil Co. v. United States,* 221 U.S. 1, 50-58, 31 S.Ct. 502, 511-15, 55 L.Ed. 619 (1911) (*Standard Oil*); *International Travel Arrangers, Inc. v. Western Airlines, Inc.,* 623 F.2d 1255, 1267 (8th Cir.), *cert. denied,* 449 U.S. 1063, 101 S.Ct. 787, 66 L.Ed.2d 605 (1980); *Sherman v. British Leyland Motors, Ltd.,* 601 F.2d 429, 449-50 (9th Cir. 1979); *Ohio Sealy Mattress Manufacturing Co. v. Sealy, Inc.,* 585 F.2d 821, 831 (7th Cir. 1978), *cert denied,* 440 U.S. 930, 99 S.Ct. 1267, 59 L.Ed.2d 486 (1979); *Oreck Corp. v. Whirlpool Corp.,* 579 F.2d 126 (2d Cir.) (banc), *cert. denied,* 439 U.S. 946, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978); *Reed Bros. v. Monsanto Co.,* 525 F.2d 486, 499 (8th Cir. 1975), *cert. denied,* 423 U.S. 1055, 96 S.Ct. 787, 46 L.Ed.2d 645 (1976); *Grunin v. International House of Pancakes,* 513 F.2d 114 (8th Cir.), *cert. denied,* 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975); *Worthen Bank & Trust Co. v. National BankAmeri-*

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[4] Conspiracies or group boycotts that by agreement or otherwise result in price fixing are *per se* violations of § 1 of the Sherman Act. *United States v. Topco Assocs.,* 405 U.S. 596, 606-09, 92 S.Ct. 1126, 1133-34, 31 L.Ed.2d 515 (1972). The mere exchange of price data and other information among competitors, however, is not *per se* illegal; indeed, such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive. *United States v. United States Gypsum Co.,* 438 U.S. 422, 441 n.16, 98 S.Ct. 2864, 2875 n.16, 57 L.Ed. 854 (1978). Appellant appears to have asked this court to find a *per se* price fixing violation of § 1. We decline its invitation to do so and choose to analyze appellees' exclusive installation policy under the rule of reason. *See* Montague, *"Per Se Illegality" & the Rule of Reason,* in 12 ABA Antitrust Section 69-104 (1958).

card, Inc., 485 F.2d 119, 127-28 (8th Cir. 1973), *cert. denied*, 415 U.S. 918, 94 S.Ct. 1417, 39 L.Ed.2d 473 (1974); *Albrecht v. Herald Co.*, 367 F.2d 517, 525 (8th Cir. 1966), *rev'd on other grounds*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968). *See also* Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 Colum.L.Rev. 1487, 1502 (1966). The rule, which focuses directly on the challenged restraint's impact on competitive conditions, has been regarded as the standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282-83 (6th Cir. 1898), *modified*, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899). The rule of reason, with its origins in common law, has given shape to the Sherman Act's broad pronouncements against agreements that restrain competition. "It has been used to give the Act both flexibility and definition, and its central principle of antitrust analysis has remained constant." *Professional Engineers, supra*, 435 U.S. at 688, 98 S.Ct. at 1363.

To be successful in its cause of action alleging a conspiracy to unreasonably restrain trade under the rule of reason, appellant must establish: (1) an agreement among two or more persons or distinct business entities, (2) which is intended to harm or unreasonably restrain competition, and (3) which actually causes injury to competition. *See generally Kaplan v. Burroughs Corp.*, 611 F.2d 286, 290-91 (9th Cir. 1979), *cert. denied*, 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116 (1980); *Gough v. Rossmoor Corp.*, 585 F.2d 381, 389 (9th Cir. 1978), *cert. denied*, 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979). The primary considerations in determining whether a restraint of trade is unreasonable are whether the intent of the restraint itself has significant anticompetitive effects. *See Sherman v. British Leyland Motors, Ltd., supra*, 601 F.2d at 449.

Simply stated, the inquiry mandated by the rule is whether, on balance, the challenged agreement is one that "merely

regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Continental T.V., supra,* 433 U.S. at 49 n. 15, 97 S.Ct. at 2557 n.15, *citing Board of Trade v. United States, supra,* 246 U.S. at 238, 38 S.Ct. at 243 (Brandeis, J.). To arrive at a conclusion, the factfinder must weigh all of the circumstances surrounding the agreement (i.e., the market impact, public benefits, economic justifications and competitive effect) before deciding whether the practice should be prohibited as imposing an unreasonable restraint on competition. *Id.* at 49-51, 97 S.Ct. at 2557-58.

"Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions." *Professional Engineers, supra,* 435 U.S. at 688, 98 S.Ct. at 1363. Agreements among competitors are justified under the rule only when a preponderance of the evidence supports the conclusion that the anticompetitive effect of the agreement is outweighed by the professional and public benefits derived from it.

As a general rule trade association agreements comport with federal antitrust laws unless they

> [have] not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy.

Standard Oil, supra, 221 U.S. at 58, 31 S.Ct. at 515; *see also United States v. American Tobacco Co.,* 221 U.S. 106, 179, 31 S.Ct. 632, 648, 55 L.Ed. 663 (1911).

The principal challenge raised by appellant is based upon the Cemetery Management Association's adoption of the exclusive foundation preparation policy. We hold that the exclusive foundation preparation policy stunts rather than develops trade within the cemetery industry and limits consumer choice and the free flow of commerce.

The Cemetery Management Association of Greater St. Louis was started over twenty years ago. According to its bylaws, the Association was formed "for the advancement of management and better cemetery operations in the Greater St. Louis area." (Plaintiff's Ex. 13A). The Association has undertaken numerous efforts to enhance the quality of services provided to the public by their membership. The Association has worked diligently to improve the durability and handling of vaults and coffin boxes. The Association has also worked to make it easier for heirs of the deceased to transfer ownership or use of cemetery lots. The Association has also adopted policies that legitimately serve its own personal and professional interests. The Association maintains a political action committee that, among other things, solicits and disburses funds for candidates for political offices. The Association also maintains a negotiation committee that deals with labor disputes with the local unions. These activities of the Association are not objectionable and clearly comport with federal antitrust legislation.

As discussed below, however, the exclusive foundation preparation policy has stymied competition in the cemetery industry. The policy has effectively restrained competition among appellees, their coconspirator cemeteries and the other monument manufacturers who wish to perform foundation preparation and placement services. By its own terms, the policy prohibits companies that only manufacture or service memorials from competing with cemeteries for a share of the foundation preparation market. The policy also serves to restrain competition among members of the Association and other cemetery owners. By giving the individual cemetery owners the sole right

to prepare the foundation, place, and maintain monuments in their respective cemeteries, a neighboring cemetery that performs the same foundation preparation and placement service at a lower price is foreclosed from competing in the overall foundation preparation and placement market. In sum, the exclusive foundation preparation policy " 'impedes the ordinary give and take of the market place,' and substantially deprives the customer of 'the ability to utilize and compare prices in selecting [foundation preparation and placement] services.' " *Professional Engineers, supra,* 435 U.S. at 692-93, 98 S.Ct. at 1365-66 (citing the district court opinion, 404 F.Supp. at 460).

The exclusive foundation preparation policy as promoted, adopted and enforced by the members of the Association (Plaintiff's Exhs. 13, 13A) violates the rule of reason because it amounts to an agreement among competitors to reduce or restrain competition. *Professional Engineers, supra,* 435 U.S. at 696, 98 S.Ct. at 1367; *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 788-89, 95 S.Ct. 2004, 2013-14, 44 L.Ed.2d 572 (1975); *United States v. National Ass'n of Real Estate Boards,* 339 U.S. 485, 70 S.Ct. 711, 94 L.Ed. 1007 (1950). Grave memorial companies and neighboring cemeteries should have an equal opportunity to compete in the foundation preparation and placement market with the owner of the cemetery lot. The marketplace, not an intraindustry agreement, should decide who provides the better service. *See Fortner Enterprises, Inc. v. United States Steel Corp.,* 394 U.S. 495, 512-14, 89 S.Ct. 1252, 1263-64, 22 L.Ed.2d 495 (1969) (*Fortner I*) (White, J.) (summary of evils of tying arrangements). While the policy does not fix prices as such, it operates as an absolute ban on competition concerning the foundation preparation services provided by the cemeteries.[5]

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[5] Appellees' affirmative defense confirms rather than refutes the anticompetitive purpose and effect of the rule. Appellees argue that the restraint is justified because of their perpetual duty to maintain the ap-

It is not necessary to find by direct evidence appellees had a specific unlawful intent to restrain trade in order to establish an unlawful conspiracy under § 1 of the Sherman Act. It is well established that circumstantial evidence may suffice to support an inference that a conspiracy to unreasonably restrain competition exists. *Interstate Circuit, Inc. v. United States,* 306 U.S. 208, 221-27, 59 S.Ct. 467, 472-74, 83 L.Ed. 610 (1939); *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.,* 497 F.2d 203, 208 (9th Cir.), *cert. denied,* 419 U.S. 999, 95 S.Ct. 314, 42 L.Ed.2d 273 (1974). When the circumstantial evidence leads to the conclusion that concerted or collaborative action has been contemplated and undertaken by competitors with the purpose and effect of eliminating competition among themselves or from others, a Sherman Act violation has been committed. *United States v. General Motors Corp.,* 384 U.S. 127, 142-43, 86 S.Ct. 1321, 1329, 16 L.Ed.2d 415 (1966); *United States v. Griffith,* 334 U.S. 100, 105, 68 S.Ct. 941, 944, 92 L.Ed. 1236 (1948); *Interstate Circuit, Inc. v. United States, supra,* 306 U.S. at 227, 59 S.Ct. at 474; *Ogilvie v. Fotomat Corp.,* 641 F.2d 581, 587 (8th Cir. 1981); *Admiral Theatre Corp. v. Douglas Theatre Co.,* 585 F.2d 877, 883-84 (8th Cir. 1978) (applying rule of reason analysis); *Arthur Murray, Inc. v. Reserve Plan, Inc.,* 406 F.2d 1138, 1144-45 (8th Cir. 1969); *Union Pacific Coal Co. v. United States,* 173 F. 737, 745 (8th Cir. 1909).

Minutes from the Association meetings reflect that the policy was frequently discussed and strongly supported by the Association. Because the anticompetitive effect of the exclusive foundation preparation policy is obvious and outweighs any public

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pearance of their cemeteries. As the discussion below reveals, no cases have been found that accept such an argument. *Infra* at pp. 1144-45. Appellees have not provided ample documentation for their assertion that the individual owner of the cemetery is the only concern that can prepare foundations or install or service grave monuments or markers in such a way that does not destroy the beautiful appearance and tranquil atmosphere of a cemetery's grounds.

benefit or procompetitive effect, we find that an unreasonable restraint on competition was the foreseeable consequence intended by the Association and its membership.

Having found that appellees conspired to unreasonably restrain trade or commerce in violation of § 1 of the Sherman Act,[6] we turn to an examination of the conditions allegedly constituting an illegal tying arrangement.

II. TYING ARRANGEMENT

A tying arrangement is defined as the sale or lease of one item (the tying product) on the condition that the buyer or lessee purchase a second item (the tied product) from the same source. *See Northern Pacific R.R. v. United States,* 356 US. 1, 5-6, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958) (*Northern Pacific*); *IBM Corp. v. United States,* 298 U.S. 131, 56 S.Ct. 701, 80 L.Ed. 1085 (1936); *Kugler v. AAMCO Automatic Transmissions, Inc.,* 460 F.2d 1214 (8th Cir. 1972); *see also* Turner, *The Validity of Tying Arrangements Under the Antitrust Laws,* 72 Harv.L.Rev. 50 (1958). Tying arrangements deny competitors and consumers free access to the tied product market, not because the seller of the tying product has a superior product in the tied market, but because of the leverage exerted by the seller using the tying product. *Moore v. Jas. H. Matthews & Co.,* 550 F.2d 1207, 1212-15 (9th Cir. 1977) (*Moore*); *see also* 3 P. Areeda & D. Turner, Antitrust Law ¶ 733 at 257-59 (1978) (Areeda Antitrust). Tying sellers, who may hold a legitimate monopoly of the tying product, are often working towards an illegitimate monopoly of the tied product. *See Fortner I, supra,* 394 U.S. at 512-14, 89 S.Ct. at 1263-64.

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[6] In adopting the Sherman Act, Congress "intended to exercise its power to the fullest extent under the Commerce Clause." *Chatham Condominium Ass'ns v. Century Village, Inc.,* 597 F.2d 1002, 1006 (5th Cir. 1979); *Joe Westbrook v. Chrysler Corp.,* 419 F.Supp. 824, 836 (N.D.Ga. 1976), *quoting United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 558, 64 S.Ct. 1162, 1176, 88 L.Ed. 1440 (1944).

Tying arrangements are presumptively illegal if three elements exist, and once those are demonstrated no specific showing of unreasonable anticompetitive effect is needed. *International Salt Co. v. United States,* 332 U.S. 392, 394-96, 68 S.Ct. 12, 14-15, 92 L.Ed. 20 (1947) (*International Salt Co.*); *Moore, supra,* 550 F.2d at 1212; *Northern v. McGraw-Edison Co.,* 542 F.2d 1336, 1344 (8th Cir. 1976), *cert. denied,* 429 U.S. 1097, 97 S.Ct. 1115, 51 L.Ed.2d 544 (1977). First, there must be two distinct products or services. *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 614, 73 S.Ct. 872, 883, 97 L.Ed. 1277 (1953). Second, the defendant must have sufficient economic power in the tying market to impose significant restrictions in the tied product market. *United States Steel Corp. v. Fortner Enterprises, Inc.,* 429 U.S. 610, 614-16, 97 S.Ct. 861, 864-65, 51 L.Ed.2d 80 (1977) (*Fortner II*). Finally, the amount of interstate commerce in the tied product market must not be insubstantial. *Northern Pacific, supra,* 356 U.S. at 2, 78 S.Ct. at 516; *Ungar v. Dunkin' Donuts of America, Inc.,* 531 F.2d 1211, 1224 (3d Cir.), *cert. denied,* 429 U.S. 823, 97 S.Ct. 74, 50 L.Ed.2d 84 (1976).

A. *Two Distinct Products*

Appellant argues that the sale of cemetery lots and the foundation preparation for grave memorials represent two separate and distinct products. While it should be noted that § 3 of the Clayton Act is inapplicable to tie-ins involving services, *Advance Business Systems & Supply Co. v. SCM Corp.,* 415 F.2d 55, 61 (4th Cir. 1969), *cert. denied,* 397 U.S. 920, 90 S.Ct. 928, 25 L.Ed.2d 101 (1970), the installation and maintenance of a product have been found to be subject to the prohibitions against ties under the Sherman Act. *Miller v. Granados,* 529 F.2d 393, 396-97 (5th Cir. 1976) (condominium sale tied to management service contract held to be distinct products and services under § 1 of the Sherman Act).

Appellant asserts that the analysis in *Moore, supra,* 550 F.2d at 1212, 1214-18, is persuasive. We agree. The facts in *Moore*

are analogous to those presented, and the conclusion reached by the Ninth Circuit concerning the existence of two distinct products is well reasoned. In *Moore,* the plaintiff, a retailer and installer of grave memorials, commenced a private antitrust action against a group of cemetery owners in Oregon. The cemeteries required that the buyer of a cemetery lot use the installation service of that cemetery. Some of the cemeteries required the buyer of a cemetery lot to purchase a grave marker from or through the cemetery. The plaintiff alleged that the exclusive installation policy represented tying arrangements prohibited under the Sherman Act. The district court entered judgment for all defendants. On appeal, the Ninth Circuit vacated the judgment and remanded the case for further proceedings. *Id.* at 1218. An application of the factors in *Moore* "leads inescapably to the conclusion that separate products and services are involved." *Id.* at 1215.

Separability is based not only upon the physical characteristics of the items involved but also on the business justification for selling the two products. Unless a cost savings results from the tying arrangement or the tied and tying products are typically used as a unit in fixed proportions, the tied product is often regarded as "generically different." *Id.* Appellees have failed to show that the business justifications here result in a cost savings to consumers. *See* text at pp. 1144-1145 *infra.* The evidence tends to show that by entering into the exclusive foundation preparation agreement appellees reduced competition rather than price.

The rules dealing with tie-ins are designed not to prohibit the sale of "physically separable" products or services, but rather to prohibit using a product in strong demand to compel the purchase of a second distinct commodity or service. *Moore, supra,* 550 F.2d at 1214. The public's demand for the ultimate product is often closely related to but legally separable from its demand for the installation of the product. *Id.* The installation of a cable television antenna system has been found to be a separate

market from the sale of the components in the antenna system. *United States v. Jerrold Electronics Corp.*, 187 F.Supp. 545, 550-59 (E.D.Pa.1960) (*Jerrold Electronics*), *aff'd*, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806 (1961)(per curiam). The installation of avionics equipment has been viewed as separate from the sale of the equipment. *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 460 F.Supp. 1151, 1154 n.8 (N.D.Ill.1978), *rev'd on other grounds*, 617 F.2d 478 (7th Cir. 1980. Separate markets also exist for the assembly of automobile parts and the servicing and delivery of those parts. *Anderson Foreign Motors, Inc. v. New England Toyota Distributors, Inc.*, 475 F.Supp. 973, 982 (D.Mass.1979).[7]

Appellees argue that because no companies in the market area provide foundation preparation services for cemeteries, no separate market for that service exists. Their argument fails because the exclusive foundation preparation policy virtually forecloses the existence of companies which would otherwise solely provide foundation preparation services. Further, a separate demand for a product or service may exist although no commercial entities exist that supply that service. This is especially true where a tying arrangement precludes entrance into the underserved market.

A separate market exists for the preparation of foundations for grave memorials. If given the opportunity to purchase the service separately, consumers would likely be drawn to the company offering foundation preparation services at the least expensive price.

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[7] *Cf. Washington Gas Light Co. v. Virginia Elec. & Power Co.*, 438 F.2d 248, 253 (4th Cir. 1971)(where the court held VEPCO's practice of providing homebuilders with inexpensive underground service installations on condition that builders erect a primarily electricity-served home was not an unlawful tie because of the lack of two separate markets).

Thus, we hold that a cemetery lot and the preparation of the foundation for grave memorials are two generic products. We next inquire whether appellees have sufficient economic power in the tying product market to impose sufficient restrictions in the tied product market.

B. *Economic Power*

Among the factors cited by the Supreme Court that are relevant to our inquiry whether appellees hold sufficient economic power are (1) the unique characteristics of the tying product or its desirability to consumers, (2) the noncompetitive nature of the price sought for the tied product, (3) the volume of sales of the tied product or service (foundation preparation), and (4) the size of the companies owning and operating the tying product (cemetery lots). *See generally Annot.*, 51 L.Ed.2d 826 (1978). As to these four elements, the record reflects that appellees possessed sufficient economic power to impose an appreciable restraint on free competition.

Monopoly power or dominance in the tying market need not be shown. *Fortner I, supra,* 394 U.S. at 502, 89 S.Ct. at 1258; *Northern v. McGraw-Edison Co., supra,* 542 F.2d at 1347. Sufficient economic power exists if the supplier of the tying product has sufficient leverage in the market to increase prices or to force a significant number of buyers to accept burdensome terms. *Fortner I, supra,* 394 U.S. at 501-03, 89 S.Ct. at 1257-58.

It is unnecessary for appellant to prove by voluminous economic data that appellees have a strangle hold on the tying market. *See* Markovits, *Tie-ins, Reciprocity, and the Leverage Theory,* 76 Yale L.J. 1397 (1967). Where the sellers are of sufficient size to exert some power, control or dominance over the tying product, the threshold standard of economic power has been met. *Osborn v. Sinclair Refining Co.*, 286 F.2d 832, 838 (4th Cir. 1960) (*Osborn*)(illegal tying arrangement for supply of oil and machinery), *cert. denied,* 366 U.S. 963, 81 S.Ct. 1924, 6 L.Ed.2d 1255 (1961).

Summarizing the case law in the area, we find that in order to answer the question of economic power we look to whether the characteristics of the tying product are unique. For example, the statutory grant of a patent monopoly in *International Salt Co., supra,* 332 U.S. at 395-96, 68 S.Ct. at 14-15, the copyright monopolies in *United States v. Paramount Pictures, Inc.,* 334 U.S. 131, 157-59, 68 S.Ct. 915, 929, 92 L.Ed. 1260 (1948), and *United States v. Loew's, Inc.,* 371 U.S. 38, 49, 83 S.Ct. 97, 104, 9 L.Ed.2d 11 (1962), and the extensive land holding in *Northern Pacific, supra,* 356 U.S. at 8-12, 78 S.Ct. at 519-21, represented tying products that the Court regarded as sufficiently unique to give rise to a presumption of economic power.

Uniqueness alone, however, is not always sufficient to infer economic power. In *Fortner II,* while the evidence showed that the credit terms offered by Fortner were unique because of Fortner's willingness to accept a lesser profit, the Supreme Court held that the unique element did not give rise to an inference of economic power in the tied market. 429 U.S. at 619-21, 97 S.Ct. at 867-68.

Fortner II, however, is distinguishable from the case at bar. 429 U.S. at 614-16, 97 S.Ct. at 864-65. Appellants have shown the cemetery owners have an unique economic advantage which enable them to offer a package arrangement for the burial and the supply and installation of the monuments that is significantly differentiated from that which the manufacturer of grave memorials can offer.

It can hardly be denied that cemeteries are distinct enterprises and have a unique public function. *Moore, supra,* 550 F.2d at 1213-16. A cemetery lot, like any piece of real estate, is unique. Further, only a limited number of people have the enormous resources required to start their own cemetery. The capital cost of starting a cemetery is far greater than the cost of manufacturing monuments or markers. Also, zoning restrictions in St. Louis and its neighboring counties make the construction of a new cemetery almost prohibitive. The costs and regulations

associated with opening a cemetery prevent appellant from offering the tying product in the unique manner that appellees offer it.

The Supreme Court in several cases has considered the volume of sales in determining whether a particular tying arrangement shows sufficient economic power to establish a violation of § 1 of the Sherman Act. *Fortner II, supra,* 429 U.S. at 616-20, 97 S.Ct. at 865-67; *Northern Pacific, supra,* 356 U.S. at 7-8, 78 S.Ct. at 519; *International Salt Co., supra,* 332 U.S. at 397-98, 68 S.Ct. at 15-16.

In *Standard Oil Co. v. United States,* 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949) (*Standard Oil of California),* the Supreme Court held that control of 6.7 percent of the retail gasoline market permitted an inference of substantial economic power. More recently, a 10 percent share of the market has been seen to be sufficient economic power to establish a *prima facie* case. *Cornwell Quality Tools Co. v. C.T.S. Co.,* 446 F.2d 825, 831 (9th Cir. 1971) (*Cornwell Tools*) (exclusive dealing contract with territorial restrictions), *cert. denied,* 404 U.S. 1049, 92 S.Ct. 715, 30 L.Ed.2d 740 (1972); *Osborn, supra,* 286 F.2d at 841.

The case before us falls within the quantitative analysis used in *Standard Oil of California, Osborn* and *Cornwell Tools.* The tying products in the case at bar are the cemetery lots supplied by appellees. Appellees accounted for 22 percent of the burials performed in the market area in 1978, and the exclusive foundation preparation policy, upon which appellant bases its claim, is uniformly followed by nearly all of the cemeteries in St. Louis.

The minimum percentage of market dominance required to establish economic power has never been specified; nevertheless, in deciding this case we need not define in detail the line of demarcation between sufficient and insufficient economic power. It suffices to hold that appellees' level of economic power is sufficient to fall within the broad authority of the Sherman Act.

In sum, appellant has shown that appellees hold a unique economic advantage. The volume of appellees' sales and the size of appellees' enterprises also lead to the conclusion that appellees possess sufficient economic power to impose an appreciable restraint on free competition.

C. *Interstate Commerce*

In any challenge based upon § 1 of the Sherman Act, the plaintiff must show that the arrangement in question did not have an insubstantial effect upon interstate commerce. *Hospital Building Co. v. Trustees of Rex Hospitals,* 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976); *Burke v. Ford,* 389 U.S. 320, 88 S.CT. 443, 19 L.Ed.2d 554 (1967); *Harold Friedman, Inc. v. Thorofare Markets, Inc.,* 587 F.2d 127 (3d Cir. 1978); *Taxi Weekly, Inc. v. Metropolitan Taxicab Board of Trade, Inc.,* 539 F.2d 907 (2d Cir. 1976); *Lehrman v. Gulf Oil Corp.,* 464 F.2d 26 (5th Cir.), *cert. denied,* 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665 (1972); *see generally* 1 Areeda Antitrust, *supra,* ¶¶ 231-33; L. Sullivan, Handbook of the Law of Antitrust § 233a (1977).

Appellees contend that their activities are purely local in nature and that if any interstate commerce was affected by the tying arrangement the amount was insignificant. We disagree.

Regardless of how local the immediate effect of an activity might be, if the activity has a substantial and adverse effect on interstate commerce, the arrangement falls within the expansive reach of the Sherman Act. *Gulf Oil Corp. v. Copp Paving Co.,* 419 U.S. 186, 195, 95 S.Ct. 392, 398, 42 L.Ed.2d 378 (1974).

The most recent Supreme Court pronouncement of the jurisdictional requirement of interstate commerce under the Sherman Act came in *McLain v. Real Estate Board, Inc.,* 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980)(*McLain*). In *McLain,* the plaintiffs asserted that various real estate brokers, firms, and trade associations had conspired to fix real estate

commissions on the sale of residential property in violation of § 1 of the Sherman Act. Both the district court and the Fifth Circuit Court of Appeals found the defendants' activities to be local in nature and without a substantial effect on interstate commerce. In reversing the Fifth Circuit, the Supreme Court held that the plaintiffs could show federal jurisdiction under the Sherman Act by "demonstrat[ing] a substantial effect on interstate commerce generated by respondent's brokerage activity." *Id.* at 242, 100 S.Ct. at 509. The Court concluded that it was unnecessary to make "the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of [defendants'] activity that are alleged to be unlawful," *id.* at 242-43, 100 S.Ct. at 509, when out-of-state funds, in part, were used to finance the residential properties.

The Supreme Court examines the magnitude of interstate commerce by asking "(1) whether a 'substantial' volume of interstate commerce is involved in the overall ... operation [of cemeteries], and (2) whether the challenged activity is an essential, integral part of the transaction and inseparable from its interstate aspects." *Id.* at 240, 100 S.Ct. at 508 (*citing* the district opinion, 432 F.Supp. at 984, *citing Goldfarb v. Virginia State Bar, supra,* 421 U.S. at 778-85, 95 S.Ct. at 2008-12).

In *Northern v. McGraw-Edison Co.*, this court aggregated the amount of interstate commerce involved for the six-year period during which the defendant had been engaged in the allegedly illegal tie-in practices. 542 F.2d at 1346-48. Applying the aggregation principle to the case at bar, we calculate that since 1972 in excess of twelve thousand persons have purchased both monuments and foundation preparation services from appellees. The volume of business affected by the tying arrangement has been over $4,200,000 during that same period. These figures cannot be said to be insignificant or insubstantial. *See McLain, supra,* 444 U.S. at 241-45, 100 S.Ct. at 508-10; *International Salt Co., supra,* 332 U.S. at 396, 68 S.Ct. at 15.

As to the second inquiry, the record establishes that many of the markers or monuments sold by the parties since 1972 were purchased from outside the state of Missouri. The total amount of such purchases was in excess of one million dollars. The purchase of grave markers and monuments is clearly "an integral part" of the transaction; and because of the "inseparability" of the purchase of markers from the overall operation of a cemetery, we hold that the enterprises affected by tying arrangements were within the stream of interstate commerce regulated by the Sherman Act. *McLain, supra,* 444 U.S. at 243, 100 S.Ct. at 509.

In addition, in making an inquiry into the effect upon interstate commerce of a tying arrangement, the court can look to the future and reasonably assume that appellees will continue in business for an undetermined period of time and that business will continue, and possibly increase, in the future. *See Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321-338-42, 91 S.Ct. 795, 806-08, 28 L.Ed.2d 77 (1971).

Thus, we hold that the amount of interstate commerce affected by the tie is not insubstantial or *de minimis. McLain, supra,* 444 U.S. at 245, 100 S.Ct. at 510; *Fortner I, supra,* 394 U.S. at 501, 89 S.Ct. at 1257; *Moore, supra,* 550 F.2d at 1216.

We have held that (1) appellees have tied two separate and distinct products into a single package, (2) appellees possess sufficient economic power to appreciably restrain competition, and (3) the tying arrangements involve a not insubstantial amount of interstate commerce. Our inquiry does not stop here, however, because we must finally examine whether appellees advance any compelling business justification for their use. *Susser v. Carvel Corp.,* 332 F.2d 505, 519 (2d Cir. 1964), *cert. dismissed,* 381 U.S. 125, 85 S.Ct. 1364, 14 L.Ed.2d 284 (1965).

D. *Justification*

Tying arrangements are valid if they can be shown to protect a legitimate antitrust interest. *See generally* Turner, *The Validi-*

ty of Tying Arrangements Under the Antitrust Laws, supra, 72 Harv.L.Rev. at 59; Comment, *Tying Arrangements Under the Antitrust Laws: The "Integrity of the Product" Defense,* 62 Mich.L.Rev. 1413 (1964). To successfully assert this defense appellees must show that (1) there are other public interests that are served by the practice in question; (2) those interests cannot be served by a less restrictive alternative; and (3) the contribution made by the restrictive practice is not outweighed by the harm to competition. *See Standard Oil of California, supra,* 337 U.S. at 306, 69 S.Ct. at 1058; *Moore, supra,* 550 F.2d at 1217-18.

Tying arrangements have been justified when a defendant proves that a substitute for the tied product must comply with such precise and detailed specifications that other manufacturers may not be able to market a product functionally compatible with the tying product. *Standard Oil of California, supra,* 337 U.S. at 306, 69 S.Ct. at 1058; *International Salt Co., supra,* 332 U.S. at 397-98, 68 S.Ct. at 15-16. Another justification exists when a small company has been compelled to use tying arrangements to scale high barriers of entry into a new capital intensive market. *Jerrold Electronics, supra,* 187 F.Supp. at 557; *see also Brown Shoe Co. v. United States,* 370 U.S. 294, 330, 82 S.Ct. 1502, 1526, 8 L.Ed.2d 510 (1962).

To justify their tying arrangement appellees argue that all the cemeteries in St. Louis have a perpetual statutory duty to maintain the quality of their lots. Appellees contend that property owners who sell a limited interest in land which they are required to maintain in perpetuity should be able to perform exclusively services incidental to that sale when such services affect its ownership interest and future obligations. We disagree.[8]

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[8] In many industries, including cable television, common carrier and condominium industries, owners or licensees retain the obligation to serve all classes of customers with technical integrity and quality service. The cable television operator must give a commitment to pro-

There are a number of less onerous methods that appellees can use to protect their legitimate property interest. The record contains evidence that shows the Cemetery Management Association on several occasions discussed preparing quality specification guidelines for foundation preparation and memorial placement. The adoption of quality guidelines in this instance would clearly be in the public interest.

We also point out that our decision in favor of multiple entry into the market for foundation preparation and placement of grave markers should not be interpreted as a policy of unlimited or unrestricted open entry. Our aim, as outlined above, is to afford concerns a reasonable opportunity to demonstrate the public advantages in increasing the number of firms that manufacture, prepare foundations, install and service grave markers and foundations. Because a *per se* tying arrangement has been found, appellees have the burden of showing that the system of competition will become unmanageable and that the foundations prepared or markers installed by their private competitors will detract from the appearance or decrease the general services rendered the public. No such showing has been made; thus appellees' justification is unwarranted.

III. REMEDY

Appellant sought treble damages and injunctive relief in the district court. The burden of proving the legal requisites of such relief was at all times on appellant as the plaintiff below. The

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vide the community with quality service throughout the life of the franchise. The telephone industry must maintain the integrity of their system, but the FCC has continued to gradually liberalize tariffs on customer installed equipment. *Network Project v. FCC,* 167 U.S.App.D.C. 220, 511 F.2d 786, 797 (1975); *Hush-A-Phone Corp. v. United States,* 99 U.S. App.D.C. 190, 238 F.2d 266, 268 (1956). *See also* Johnson, *Boundaries to Monopoly and Regulation in Modern Telecommunications,* in Communications for Tomorrow 127, 133 (G. Robinson ed. 1978). Thus, the continued obligation to maintain does not, without more, present an ample justification for the existence of a predicate tying arrangement.

district court, after a ten-day trial, found that "[appellant] was not injured by the Rule" (in essence, the tying arrangement), that "[appellant] was not damaged in any amount capable of ascertainment by this Court," and that "[appellant's] evidence of damages was wholly speculative." 505 F.Supp. at 530. We read the district court's opinion as holding that appellant failed to meet the burden of proving the fact of damage was well as the amount of damages. The district court's findings of fact cannot be disturbed on appeal unless "clearly erroneous" *See* Fed.R.Civ.P. 52(a); *e.g., Zenith Radio Corp. v. Hazeltine Research, Inc., supra,* 395 U.S. 100 at 123, 89 S.Ct. 1562 at 1576. With this standard in mind, we now discuss appellant's claims for damages and injunctive relief.

A. *Damages*

A plaintiff seeking treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15, must establish an antitrust violation, the fact of damage or injury, a causal relationship between the violation and the injury, and the amount of damages. *See e.g., Paschall v. Kansas City Star Co.,* 605 F.2d 403, 407-08 (8th Cir. 1979); *Admiral Theatre Corp. v. Douglas Theatre Co., supra,* 585 F.2d at 893; *see generally L. Sullivan, Antitrust* § 251 (1977); 15 J. Von Kalinowski, Antitrust Laws and Trade Regulation § 115.02 (1981). Initially one must prove the *fact* of damage "to a reasonable certainty," *Admiral Theatre Corp. v. Douglas Theatre Co., supra,* 585 F.2d at 893, and then prove the *amount* of the damage to the extent that it is "capable of reasonable ascertainment and ... not ... speculative or conjectural." *Id.*

"[T]here is a clear distinction between the measure of proof necessary to establish the fact that [appellant] had sustained some damage and the measure of proof necessary to enable the jury to fix the amount." *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 562, 51 S.Ct. 248, 250, 75

L.Ed. 544 (1931). "[Appellant's] burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage." *Zenith Radio Corp. v. Hazeltine Research, Inc., supra,* 395 U.S. at 114 n.9, 89 S.Ct. at 1571 n.9.

> Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.

Id. at 123, 89 S.Ct. at 1576.

We conclude that the district court's finding that appellant failed to prove the *fact* of damage is clearly erroneous. Appellant's evidence was sufficient to support the inference that appellant had in fact been injured by appellees' exclusive foundation preparation policy. The tying arrangement employed by appellees effectively excluded appellant from the market for the sale, preparation, and installation of monument foundations.

The district court further found that appellant failed to prove the *amount* of damage. There were three "theories" of recovery submitted to the district court. Theories two and three were dependent on the validity of theory one; thus, only theory one needs to be discussed here. Recovery under theory one was based on the overcharge that appellant allegedly paid appellees for foundation preparation since 1974. Appellant sought to prove that it could have prepared foundations at a lower cost than the price charged by appellees. Thus, appellant sought to measure the damages caused by its exclusion from the foundation preparation market by establishing loss of sales and lost profits.

In an effort to show that it could beat appellees' foundation preparation charges, appellant introduced evidence of numerous time studies of foundation preparation and installations which calculated the costs of labor and materials. Based on these studies, appellant claimed that it could prepare certain fundations and install memorials for under $20 as opposed to the $75 price charged by one of appellees. Tr. at 342. These time studies were attacked by appellees, however, on the basis that appellant failed to take into account the different soil conditions at the various cemeteries, the resulting increases in administrative costs, and the possible need for new equipment and additions to their labor force. Appellees sought to undermine the accuracy and sufficiency of appellant's proof of damages.

Resolution of such conflicts in evidence is properly left to the district court, and here they were resolved in favor of appellees. The district court found that "[c]omparison of [defendants'] charges with plaintiff's incredible estimates and promises [was] meaningless." 505 F.Supp. at 528. The district court further found that "plaintiff was not damaged in any amount capable of ascertainment by this Court" and that "[p]laintiff's evidence of damages was wholly speculative." *Id.* at 530.

We have reviewed the record and cannot say that the district court's finding that appellant simply failed to satisfy its burden of proof as to the *amount* of damages is clearly erroneous. We therefore affirm the denial of damages. An award of damages may not be based upon mere speculation. However, appellant's evidence was insufficient only as to the measurement of damages. As discussed above, appellant established that it had been excluded from the foundation preparation market by the tying arrangement (the exclusive foundation preparation and installation policy). Under the circumstances, we think an award of nominal damages is justified and remand to the district court with directions to award appellant nominal damages in the amount of $3.

B. *Injunctive Relief*

The standard for the granting of injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26, is somewhat different from the standard for the award of damages. In the injunction context, once a determination has been made that the defendant has violated the antitrust laws, a plaintiff need only demonstrate a "threatened loss or damage" growing out of the violation, 15 U.S.C. § 26. Injunctive relief, therefore, is "available even though the plaintiff has not yet suffered [or proved] actual injury; [the plaintiff] need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a comtemporary violation likely to continue or recur." *Zenith Radio Corp. v. Hazeltine Research, Inc., supra,* 395 U.S. at 130, 89 S.Ct. at 1580 (citation omitted). In the case at bar there has been an antitrust violation, and due to the nature of that violation we conclude that appellant is entitled to injunctive relief as a matter of law.

It is beyond cavil that the tying arrangement employed by appellees has had the effect of excluding appellant from the market for the sale, preparation, and installation of monument foundations. This exclusion of appellant from the market, in our view, represents a "threatened loss or injury" sufficient to require injunctive relief. A similar situation was considered by the Supreme Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.:*

> Judged by the proper standard, the record before us warranted the injunction .... The findings of the District Court were that [the defendants] were conspiring to exclude Zenith and others from the ... market; there was nothing indicating that this clear violation of the antitrust laws had terminated or that *the threat to Zenith inherent in the conduct* would cease in the foreseeable future.

395 U.S. at 131, 89 S.Ct. at 1582 (emphasis added). In the present case the threat inherent in the conduct is even more im-

mediate where, by the very terms of the tying arrangement, appellant is excluded, in fact, from the relevant market. Accordingly, the district court's denial of injunctive relief is reversed, and this portion of the cause is remanded to the district court for formulation of an appropriate order. Appellees, individually or through the Management Association, are free to propose and adopt reasonable rules and guidelines with respect to the foundation preparation and installation of monuments by third parties.

C. *Attorney's Fees*

Appellant is entitled to reasonable attorney's fees and costs. 15 U.S.C. §§ 15, 26 (as amended in 1976). This matter is remanded to the district court for determination.

Affirmed in part, reversed in part, and remanded with directions.

APPENDIX F

§ 15. Suits by persons injured—Amount of recovery; prejudgment interest

(a) Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect ot the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

Recovery by foreign states

(b)(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

(A) such foreign state would be denied, under section 1605 (a) (2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

Definitions: "commercial activity"; "foreign state"

(c) For purposes of this section—

(1) the term "commercial activity" shall have the meaning given it in section 1603 (d) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603 (a) of Title 28.

APPENDIX G

§ 26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.